

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-2299

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2299

REID L. FELDMAN, ADM'R

Plaintiff-Appellee

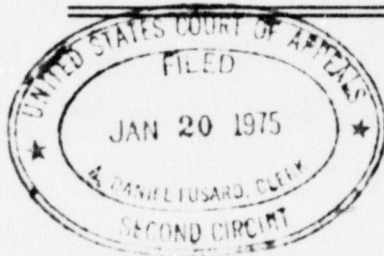
vs.

ALLEGHENY AIRLINES, INC.

Defendant-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF DEFENDANT



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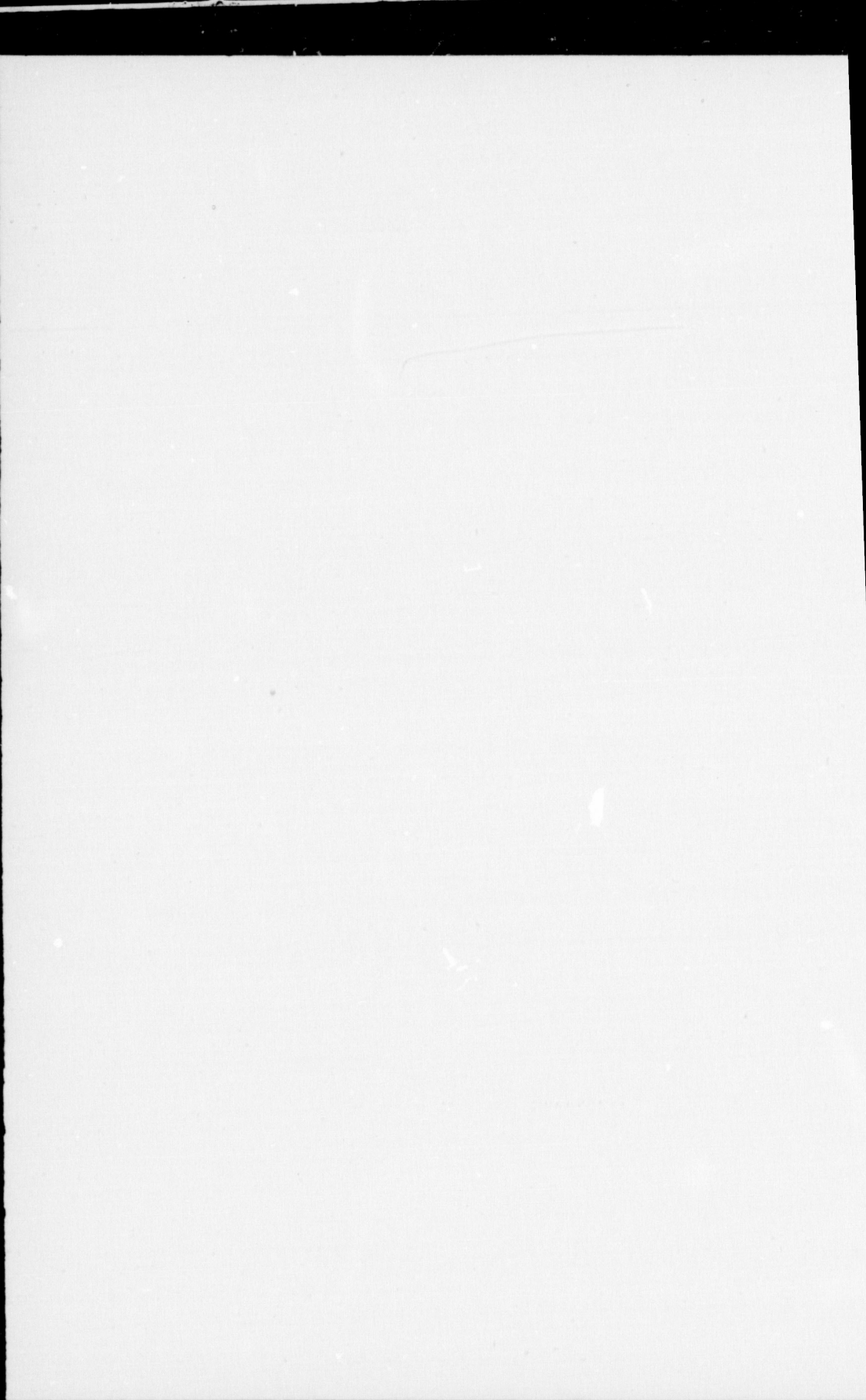


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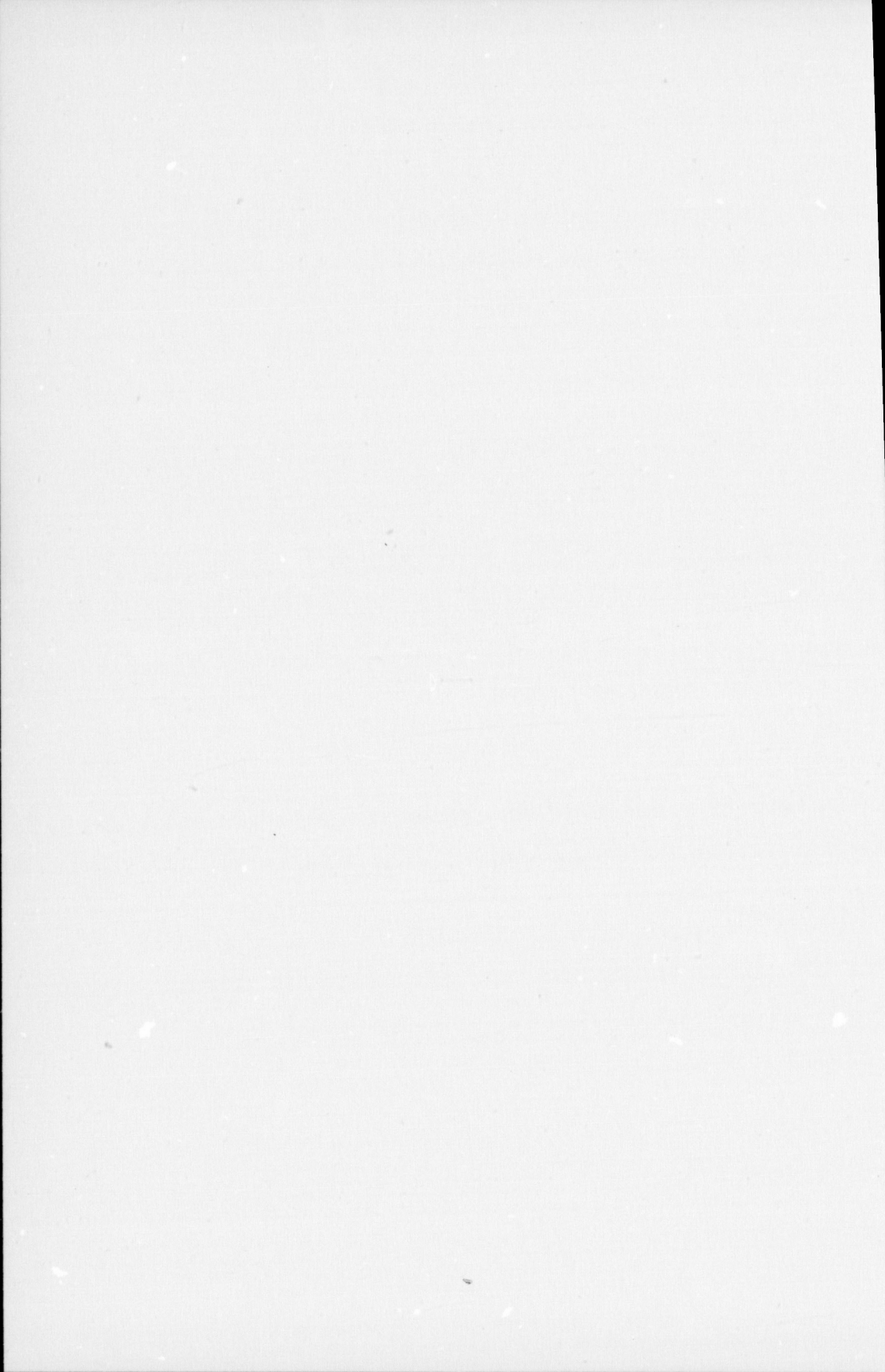
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Statement of the Issues

- I. Did the Trial Court apply a correct discount rate?
- II. Did the Trial Court properly consider the impact of inflation?
- III. Were Government Service Pay Tables misused?
- IV. Was Mrs. Feldman given a proper starting salary?
- V. Was the earning capacity of a housewife correctly considered?
- VI. Was the verdict as a whole excessive?

Statement of the Case

On June 7, 1971, an Allegheny Airlines flight crashed in fog while approaching the New Haven Airport, and Nancy Feldman was one of the passengers killed. Her administrator brought a wrongful death action under Connecticut Law. Prior to trial, the plaintiff waived punitive damages, the defendant agreed not to contest liability; and both parties agreed to waive a jury trial.

Mrs. Feldman was 25 years old, in good health, and married with no children; she had a bachelor's degree from the University of Pennsylvania and was working at a New Haven planning firm making \$10,000 a year. Her husband had just gotten a job in Washington, D.C., and she was about to quit her job and look for a new job in planning in the Washington area.

A judgment was entered for \$444,056, from which the defendant appeals.

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

REID L. FELDMAN, Adm'r :
Plaintiff-Appellee :

VS.

DOCKET NO. 74-2299

ALLEGHENY AIRLINES, Inc. :
Defendant-Appellant :

I. Discount Rate

The discount rate used by the District Court is $11\frac{1}{2}$ per cent. The court justifies this rate by saying that it has factored inflation out of future earnings, and therefore it should factor inflation out of the discount rate. In the next section, the defendant proposes to show that the court has no right to consider inflation in its computations of future earnings. In this section, the defendant proposes to show that the court must use a considerably higher discount rate.

After discussing Connecticut authority on the subject and concluding that those cases are not helpful in setting the rate, the court quotes at length from *Chesapeake & Ohio R. Co. v. Kelly*, 241 U.S. 485 (app. 36a-38a, footnote 25). The defendant completely agrees that this case correctly states the law applicable to this case, for it is rather clear that *Kelly* is referring to the actual discount rate obtainable in the market place, and not to the inflation-adjusted "real" discount rate referred to by the court.

"We do not mean to say that the discount rate should be at what is commonly called the 'legal rate' of interest; . . . It may be that such rates are not obtainable upon investments on safe securities, . . . This, however, is a matter that ordinarily may be adjusted by scaling the rate of interest to be adopted in computing the present value of the future benefits; . . ."

While *Kelly* is not explicit, the clear implication is that the discount rate should be based on the actual rate obtainable in the safest investments rather than artificial "inflation-free" discount rate.

Although the Connecticut Supreme Court has not commented on the appropriate discount rate, the Second Circuit has. In *Alexander v. Nash-Kelvinator Corporation*, 271 F.2d 524, the court criticizes a 2½ percent discount rate, and says at least a 4 percent rate must be used. It should also be noted that this 4 percent rate was to be applied to uninflated prospective earnings, as the District Court had awarded flat rate of \$800 and \$400 for each year of lost future earnings. (In addition, this court reversed the future earnings awards outright). 271 F.2d at 527, 528.

In *Conte v. Flota Mercante Del Estado*, 277 F.2d 664 and in *LeRoy v. Sabena Belgian World Airlines*, 344 F.2d at 278, at 277 F.2d at 669, neither case appears to consider higher scales.

In *Rapisardi v. United Fruit Company*, 441 F.2d 2308, this court refers to a post judgment loss of income discounted by five percent, the only criticism being that the loss was not discounted on a yearly basis. 441 F.2d at 1212, 1313. Referring to the trial court opinion, 300 F.Supp. 942, 947, one finds that no significant factor was included in the wage scales for inflation, as his increase in salary was to be only 10 percent every three years. The District Court in *Feldman* allows increases of this order in Table I, (app. 54a), which increases the court states (correctly) are related to increased experience and productivity and have nothing to do with inflation (app. 31a).

In Petition of *Marina Mercante Nicaraguense, S.A.*, 248 F. Supp. 15, modified, 364 F.2d 118, cert. den. 385 U.S. 1005, the trial court awards insignificant increases in future earnings, and then discounts the figure 4 percent. On

appeal this court praises the trial court's computations and modifies the judgment only on the issue of taxes.

Finally, coming to a case decided on July 31, 1974, *Petition of Marine Sulphur Transport Corp.*, (S.D.N.Y., Cannella, J.), one finds the court awarded increases in wages of 6 percent per year, but then discounted them 6 percent per year as well. In the present case, the court awarded Mrs. Feldman 3 percent increases per year, but discounted them only $1\frac{1}{2}$ percent.

The overwhelming authority in this circuit, therefore, is that future earnings must be discounted at least 4 percent, and this rate cannot be avoided by talk about inflation-free discount rates.

II. Inflation

The District Court holds that the Connecticut courts would permit the trier to consider the depreciated value of the dollar in assessing damages. It will not do for the court simply to say that Connecticut law is unclear ($1\frac{1}{2}$ -page discussion, app. 41a-42a), and then indulge its own views, supplemented from cases around the country, as to what that law ought to be (see app. 39a-41a, 43a-45a). Judge Frank put it well thirty years ago:

"We think this case is in that zone in which federal courts must do their best to guess what the highest state court will do." *Cooper v. American Airlines, Inc.*, 149 F.2d 355, 162 A.L.R. 318, 322.

As we all know, the Connecticut Supreme Court is fully capable of going its own way in wrongful death cases (the tax issue, for example). The important question is what the present Connecticut Supreme Court would do with *Quednau v. Langrish*, 144 Conn. 706, 137 A.2d 544. *Quednau* says:

"The plaintiff requested the court to charge that the jury should consider the depreciated value of the dollar in making an award of damages to the plaintiff . . .

There was no basis in the evidence for the requested charge in the instant case." 144 Conn. at 714, 137 A.2d at 548-49.

Why not? The facts are that the plaintiff was a wage earner and there was evidence of a permanent partial disability, 144 Conn. at 709, 137 A.2d at 546. Thus the inflation issue serves the same purpose in *Quednau* as it does here.

The trial court refuses to consider *Quednau* in point because of the following caveat:

"It is unnecessary to hold unequivocally, in deciding this case, that no case could arise in which it would be proper to charge the jury that they should take into consideration the depreciated value of the dollar in assessing damages. See 2 Harper and James, LAW OF TORTS, § 25.11." 144 Conn. at 714, 137 A.2d at 549.

That the District Court places too heavy reliance on this caveat is demonstrated by reading the section cited from Harper and James.

"Greater confusion surrounds present damages for future loss. Future trends in the value of money are necessarily unknown and so always render such damages speculative in a way we cannot escape. If the estimates represent a straight-line projection of present living costs, they will be frustrated by fluctuations either way. If prophecy of change is heeded, frustration will follow if no change, or the opposite change occurs. When courts have consciously grappled with the problem they have either found all prophecy too speculative and so, perforce, have taken the equally speculative course of betting on a continuance of the status quo; or they have made intuitive and not always very wise judgments that present conditions represent a departure from some imaginary norm to which they think we shall rapidly return. It is not at all clear that courts would be willing to hear experts on the

matter, or that they would get much real help if they did. For the most part the problem — which is inevitably present in every case of future loss — is not analyzed and the *present value of money is assumed to be the proper basis.*

The problem is necessarily insoluble under the principle of the single lump sum recovery. It could be approached with intelligent flexibility under a system of periodic payments continuing for the duration of future needs, though such a system would pose other problems including a greater administrative burden on courts and defendants."

[emphasis added]. 2 Harper and James, LAW OF TORTS, § 25.11.

That the caveat is overestimated is also demonstrated by its context. The *Quednan* court had just demonstrated (citing several cases) that it was proper for a reviewing court to consider inflation in comparing its verdict with older verdicts. Perhaps the court felt that the caveat was necessary for a case in which a comparison of verdicts might some day be properly before a jury (for example, one element of proof in an indemnification case is the reasonableness of the settlement between the indemnitee and the injured party). Such a concern is far removed from this case.

The Connecticut Supreme Court considered the present issue by implication in the very recent case of *Darling v. Burrone Bros., Inc.*, 162 Conn. 187, 200-01, 292 A.2d 912, 920.

"For the five years from the date of the accident to the date of trial the plaintiff offered evidence of a loss of earning capacity of \$20,000. The plaintiff's annual wage was approximately \$4,900.

If the annual rate were multiplied by the plaintiff's work expectancy of 18.8 years, the future loss is \$92,000; if multiplied by the net loss rate accident to trial, the future loss rate is \$75,000; even if the future

loss were reduced to present worth such loss would amount to \$60,000."

Simple computations show that no adjustment whatever was made for inflation, not to speak of merit increases.

By using a net discount rate of $1\frac{1}{2}$ percent, the District Court conceals the implications of its use of inflation. As the defendant's expert demonstrated in his affidavit for the Motion for New Trial, a net discount rate of $1\frac{1}{2}$ percent is substantially the same as a gross rate of 6 percent minus an inflation rate of $4\frac{1}{2}$ percent (affidavit, pp. 4-6). The affidavit further shows that, with those figures, the court was actually finding that in the year 2011 Mrs. Feldman would have been earning \$122,823 per year (affidavit, p. 11, sixth column). Similar computations could be made for $4\frac{1}{2}$ percent minus 3 percent, or 7 percent minus $5\frac{1}{2}$ percent. It may be that the Alaska Supreme Court would be content with such figures, but it is difficult to believe that the court that authored *Quednau* and *Darling* would accept the District Court's analysis, especially since the plaintiff's expert was not even an economist (app. 177a). See *Magill v. Westinghouse Electric Corp.*, 464 F.2d 294, 300 (3d Cir.)

While no one would quarrel with Judge Friendly's observation that few would be willing to translate their earning power into a fixed annuity, *McWeeney v. New York, N.H. & H. R. Co.*, 282 F.2d 34, 38, the refusal explicitly to consider inflation in future earning capacity has a sound economic basis. Historically, and even more so today, earnings do not keep up with inflation. Cost-of-living clauses just recently have been won by some labor unions, and none would dispute that the wage earner is a primary casualty of inflation. On the other hand, inflationary interest rates can be taken advantage of when the investor receives the judgment. Few would consider it imprudent today to invest in long-term federal bonds yielding in excess of 6 percent. Even if the ultra-prudent investor would make

shorter term investments, he still would have a very high rate of return for a time. Thus the use of a discount rate of 4-6 percent, based on long-term historical trends, is sufficiently conservative to compensate for any cost-of-living increases which were omitted from Table I of the Memorandum of Decision.

III. Misuse of Government Service Pay Tables

In deciding what Mrs. Feldman's probable pay raises in 1971 dollars would be, the court decided to use the GS tables since they were convenient and because

"the salary schedules of NLC/USCM are the same as the federal government's and are thus reflective of salaries throughout the Washington area . . ." (app. 31a).

While the sentiments of the court are eminently reasonable, the problem is that neither party requested that the tables be used as they were, and thus it is that the court has misunderstood them.

The court assumed that a federal civil servant normally moves up one rate within a particular GS level each year (app. 31a). This assumption apparently was based on deposition testimony in which the deponent may well have been assuming that the questioner was referring to employees at the lower salary rates. (Exh. 17, p. 12). Thus in Table I (app. 54a), we see an increase either in rate or GS level every single year to age 65. In fact this is not the rule at all. The Federal Civil Service Regulations in force on June 7, 1971 (and today) are as follows:

"a. Length. (1) The length of the waiting period varies with the numerical rate of a grade in which the employee is serving. The waiting periods are as follows:

- (a) 53 calendar weeks of creditable service to go to rates 2, 3, or 4;

- (b) 104 calendar rates of creditable service to go to rates 5, 6, or 7; and
- (c) 156 calendar weeks of creditable service to go to rates 8, 9, or 10."

Federal Personnel Manual, Chapter 531, Subchapter 4, Section 4-7. Waiting Period.

Naturally there are exceptions for high quality and low quality performance (Sections 4-9 to 4-12), but the general rule is not what the court holds it is.

This makes drastic changes in the computations of Table I. For example, for the eight years the court assumed Mrs. Feldman would be a housewife, she would be on the GS 12-4 rather than GS 12-5 level. Also the court assumed (app. 54a) that Mrs. Feldman would go up to GS 12-10 before moving to GS-13 in 1991. If the court were to assume, consistent with the above regulations, that she would still be promoted to GS 13 in 1991, then she would only have attained GS 12-7 in 1990 and, to obtain the minimum increase (app. 54a), she would have been transferred to GS-13-2 rather than GS 13-5 in 1991. Similar significant differences would then occur throughout the chart.

If, on the other hand, the court stood fast to its assumption that Mrs. Feldman would proceed to GS 12-10 before going to GS 13 (app. 32a), then GS 13-5 would be reached, not in 1991, but in 2001.

The court also misused the GS tables by assuming that the plaintiff would proceed as a matter of course to GS 15 and GS 16 (app. 55a). GS 16 is one of the three "super" grades as to which the statutes provide quotas. 5 U.S.C. 5108. The only testimony as to which GS levels were attainable as a practical matter to people with Mrs. Feldman's background came from the deposition of Mrs. Rodman, the personnel manager for the National League of Cities. She indicated that such people usually start at

GS-10 and move up to GS-14 (Exh. 17, p. 9). It is of course possible that Mrs. Feldman would have obtained further education in order to strengthen her chance of moving to the highest salary levels. But the court makes no such finding, and in fact finds as follows:

"Thus the Court's conclusion that she would probably have eschewed law school in favor of immediate employment as a legislative analyst, represents an election of the more conservative alternative in terms of her net lifetime earning capacity." (app. 27a).

IV. Starting Salary

At her death Mrs. Feldman was making \$10,000 working for a planning firm in New Haven, and she was about to go to Washington to look for a new job since her husband was starting a job there. She had a Bachelor of Arts degree from the University of Pennsylvania. There is no evidence that she intended to obtain any further education, but she did intend to interrupt her career to raise a family (app. 32a).

Mrs. Rodman, the plaintiff's own witness, and the person obviously best qualified to state what Mrs. Feldman's job opportunities were in the Washington area, stated:

"Q Mrs. Rodman, I show you Exhibits R-1 and R-2 which are resumes of and summaries of Nancy Hollander Feldman and I ask you to look at those.

A Yes.

Q For which of the grades which you have identified as being available for non-lawyers in the legislative field in your organization would Nancy Feldman have been qualified in July, 1971?

A I think probably the GS-10, the program in legislative research position.

Q And at what salary would she have started, 1971?

A I would say the \$11,000 level — eleven-five. That was the beginning of GS-10." (Exh. 17, pp. 14-15).

The Court disregards Mrs. Rodman's opinion for this reason:

"However, this assessment of the decedent's qualifications was based solely upon Mrs. Rodman's review of two documents.

Evidence not before Mrs. Rodman but before this court establishes that Mrs. Feldman had assumed direct lobbying and client contact responsibilities at Cogen, Holt by the time of her death." (app. 28a-29a).

Quite the contrary, Exh. R-2, which was before Mrs. Rodman, indicated that Mrs. Feldman's work consisted of administrative duties, research, legislative work and writing. Under the first heading is found:

"Helping to arrange CCM (Connecticut Council of Mayors, which was a major client) meetings, *Aid CCM Committees*, and *coordinate presentation of testimony at legislative hearings* and monitor allocation of CCM staff time." [emphasis added].

Under the third heading is found:

"*Legislative Work*: e.g., tracking and lobbying on bills." [emphasis added].

The Court was impressed that Mr. Cogen, Mrs. Feidelson, and Mr. Heimann would have given strong recommendations to Mrs. Feldman and that Mr. Cogen felt that she could perform at the GS-12 level (app. 29a). But Mrs. Rodmann knew all this. Exh. R-2 states:

"This material gives direct evidence of the high calibre of her work, a large portion of which was in connection with the consulting services provided by Cogen/Holt Associates in behalf of the Connecticut Conference of Mayors.

...

All of the above tasks demanded highly individual initiative and responsibility, precise analytical skills, and

ability to work in a variety of substantive areas. As is shown by attachments, Nancy Feldman has a clear and demonstrated capacity for competence in this field of work."

The Court is finally impressed with the spectacular success of one of Mrs. Feldman's former associates, Steven Bourke, who at age 28 is a top aide to Speaker Albert making \$30,000 a year (app. 162a). Bourke testified about the ease with which he attracted, and even turned down, high paying jobs, about how his educational background was similar to Mrs. Feldman's (app. 170a), and about what an important position he has.

"THE COURT: What do you do that pays you \$30,000 a year from the government? You are a Legislative Analyst working for Carl Albert, is that it?"

THE WITNESS: There are two people who handle national legislation for the Speaker of the House, and I'm one of them.

...

THE COURT: You are paid \$30,000 to let him know what's going on, is that it? In the legislature?

THE WITNESS: In a very real sense, yes. He has many decisions to make that he needs all the information on.

THE COURT: It's a great field, I must admit."
(app. 163).

Mr. Bourke's testimony may have been relevant for those with a magic touch, but Mrs. Rodman's testimony should have jolted the Court back to the real world that mere mortals live in. The Court should have started Mrs. Feldman at the GS 10 rather than the GS 12 level. If the plaintiff was not satisfied with Mrs. Rodman's conclusion, the plaintiff could have adduced other testimony as to the

actual state of the Washington job market. Neither Mr. Bourke nor the Connecticut witnesses testified as to what jobs were actually available in 1971 in Washington and how much they paid. Only Mrs. Rodman so testified. Not only is there insufficient evidence to support the Court's conclusion, but that conclusion is contrary to the clear weight of the plaintiff's own evidence.

V. Earning Capacity of Housewife

The Court found as a fact that Mrs. Feldman would probably be at home raising a family from 1977 to 1985 (app. 32a, 34a). The Court then awarded her a loss of earning capacity for each of those years equal to what she would have earned in 1976.

"When a person who does possess significant earning capacity chooses, as is her right, to forego remunerative employment in order to follow other pursuits, such as child-rearing, that person manifestly values those pursuits at least as highly as the sacrificed remuneration, and the loss through wrongful death of the opportunity to engage in non-remunerative occupations may thus fairly be measured by reference to the earning capacity possessed by the decedent." (app. 26a).

No authority is cited for this proposition, and it is contrary to Connecticut law. The problem is that the Court overstated the difference between future earnings and future earning capacity (app. 26a). *McKirdy v. Cascio*, 142 Conn. 80, 86, and 111 A.2d 555, and *Davis v. P. Gambardella & Son Cheese Corporation*, 147 Conn. 365, 370, 161 A.2d 583, cited by the Court, distinguished between the two concepts for a purpose wholly unrelated to this case. *McKirdy* involved an 18-year-old boy, and the difficulties of projecting his future earnings; *Davis* involved a partner whose past salary may have been unrelated to the value of his services. Both cases assumed, for the period in question, that the wage-earner would actually be working.

In *Floyd v. Fruit Industries, Inc.*, 144 Conn. 659, 671, 136 A.2d 918, 925, the general rule is stated:

"When destruction of earning capacity, that is, the capacity to carry on the particular activity of earning money, is to be compensated for, the inquiry in the first instance is as to probable net earnings, in the ordinary sense of that phrase as used in accounting practice, during the probable lifetime. [The Court goes on to discuss the effect of income taxes]".

This general rule is applied particularly to housewives in *Chase v. Fitzgerald*, 132 Conn. 461, 465, 470, 45 A.2d 789. The decedent there had raised a family of seven children and after a divorce had gone to work as a housekeeper. However, at the time of her death, although she "could work as well as anyone (except for a foot problem)", she had remarried and was in fact not working and not planning to return to work. The District Court presumably would have said she had voluntarily removed herself from the work force and would have considered her lost earnings capacity for the years she could have worked if she had wanted to.

This is not the approach the Connecticut Supreme Court took, however, in *Chase*. At p. 470 the case reads as follows:

"The decedent at the time of her death was not gainfully employed and there is no evidence indicating that she was likely thereafter to become a wage earner. In estimating damages properly allowable for her death, loss of earning capacity might not be a very material element to be considered. *There remains, however, the destruction of her capacity to carry on life's activities as wife and homemaker in the way she would have done had she lived.*" [emphasis added].

Any compensation for the years Mrs. Feldman would be a housewife therefore belongs, not under the lost earning capacity column, but under the loss of life's activities column.

This also was the approach in *Fairbanks v. State*, 143

Conn. 653, 124 A.2d 893. *Fairbanks* concerned a housewife who was planning to return to work. While the Supreme Court did not expressly refer to the issue, it did approve the trial court's memorandum of decision. In that decision, we find the following:

"The jury were instructed to consider and evaluate . . . the destruction of her capacity to carry on life's activities as wife, homemaker and mother, and in the discharge of her domestic duties as the head and administrator of the internal affairs of her home (*Chase v. Fitzgerald*, 132 Conn. 461, 470); and the destruction of her earning capacity (*Chase v. Fitzgerald*, 132 Conn. 461, 469)." A-345 Connecticut Records and Briefs 230, 237-38.

At first glance this argument appears futile, since it involves a mere transfer and no necessary diminution of the award. But the amount subject to transfer is large. If the present value of the earnings in Table I for the years 1977-1984 inclusive is removed, that amounts to \$93,577.00. A transfer would then make the future-earning-capacity-less-living-expenses category \$250,479 and the destruction of the capacity-to-enjoy-life's-activities category \$193,577, and the trial court would probably not have awarded such a high amount in the latter category.

"However, since the Supreme Court of Connecticut has intimated that damages for the destruction of earning capacity should be the 'principal element of recovery' in the wrongful death of one 'who earns a relatively large income,' [citations omitted], the award must be relatively conservative in view of the substantial award of damages in the destruction of Mrs. Feldman's future earning capacity." (app. 56a-57a).

VI. Excessiveness of Verdict

The Court begins its excursion into the realm of accountants, economists and mathematicians with the caveat that:

"... the Court is mindful that '[t]he whole problem of assessing damages for wrongful death . . . defies any precise mathematical computation.'" (app. 24a).

That having been said, the Court spends most of the rest of the opinion making precise mathematical computations. Never once after the introductory remarks does the Court step back to survey the result with the above caveat in mind.

With the Court's concern for mathematical precision, no consideration was given to factors which are difficult to fit into a precise chart, but which are supposed to be considered by fact finders. In *Chase v. Fitzgerald*, 132 Conn. 461, 469, 45 A.2d 789, the court states:

"The loss would necessarily be limited in time to that period which the trier might find to be the probable length of life of the deceased had he not been killed [citation omitted]; *and* the trier must consider the extent to which the ordinary vicissitudes of life would have been likely to affect the decedent's continued enjoyment of his faculties" [emphasis added].

Just because the court has determined Mrs. Feldman's life and work expectancy doesn't mean she is exempt from the "ordinary vicissitudes of life." Healthy people get sick, jobs work out poorly, accidents occur, husbands get transferred, unplanned children arrive.

The court could have even introduced the vicissitudes of life into its mathematical computations to some extent. Mrs. Feldman was 25 at her death, and had a life expectancy of 52 years (app. 33a). Because of this the court assumed that she would work to age 65 and gave her full credit for each year of work to age 65. But just because her life expectancy was 52 years doesn't mean she was guaranteed to live to age 65. Since she had less than a 100 percent chance of surviving to that age why should the defendant be responsible for paying 100 percent of her lost earning capacity to that age?

It may be that for these reasons that judgments almost invariably are for less than the discounted value of the decedent's expected earnings to age 65. See *Floyd v. Fruit Industries, Inc.*, 144 Conn. 659, 136 A.2d 918; *Perry v. Allegheny Airlines, Inc.*, 489 F.2d 1349. In *Moffa v. Perkins Trucking Co.*, 200 F.Supp. 182, there was evidence that the loss of earning capacity alone was \$142,000 to \$159,000. The jury awarded \$150,000, which Judge Clarie said was "at the top of the bracket within which the jury's discretion and judgment should be upheld." 200 F. Supp. at 190. Yet nowhere in the present decision can reference to the vicissitudes of life be found.

Under the category of loss of life's activities, the court awarded \$100,000 exclusive of any award for her value as a housewife from 1977-1985. The Court did give lip service to the correct text — that that part of the judgment should be relatively conservative. We may have come a long way since *Chase v. Fitzgerald*, 132 Conn. 461, 45 A.2d 789, when a defendant could seriously claim that \$9,000 for a housewife was excessive, but inflation is not that rampant.

In *Floyd v. Fruit Industries, Inc.*, 144 Conn. 659, 136 A.2d 918, the leading Connecticut wrongful death case, the decedent's gross income for each of the preceding five years was over \$50,000 (144 Conn. at 671, 136 A.2d at 925), yet the entire award was the same as this trial court's award for life's activities above.

Had the Court stepped back to survey the judgment as a whole, it would have discovered a startling fact that bears out the wisdom of the statements of the Connecticut Supreme Court that wrongful death judgments defy precise computations. The plaintiff has been awarded \$444,000. A novice could invest that sum with maximum safety at over 6 percent interest any time in the past ten years, and probably any time in the foreseeable future. Thus Mrs. Feldman's heirs can make over \$26,640 per year with complete

safety for the rest of their lives and at their deaths leave the principal of \$444,000 to their heirs.

CONCLUSION

Because of the numerous misapplications of law and fact in the judgment below, the defendant respectfully requests this court to vacate the judgment and remand for a new trial. Alternatively, the defendant requests that a substantial remittitur be ordered.

Respectfully submitted,

By

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NO. 74-2299

REID L. FELDMAN, ADM'R : UNITED STATES COURT
OF APPEALS

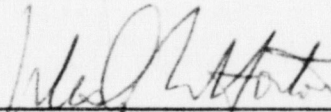
Plaintiff-Appellee

VS. : FOR THE SECOND CIRCUIT

ALLEGHENY AIRLINES, INC. : JANUARY 15, 1975

CERTIFICATION

I hereby certify that on the 15th day of January, 1975, I served two copies of the brief and one copy of the appendix hereof by depositing it into the mails to John W. Douglas, Esquire.



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